United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7208, 7211

To be argued by
VICTOR S. CICHANOWICZ

United States Court of Appeals
FOR THE SECOND CIRCUIT

BENITO LOPEZ,
Plaintiff-Appellee,

against

EGAN OLDENDORF,
Defendant and Third Party Plaintiff-Appellant and Appellee,

against

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,
Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,
Plaintiff-Appellee,

against

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,
Defendants-Appellees and Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLANT, EGAN OLDENDORF

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BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLANT, EGAN OLDENDORF

Issues Presented

1. Does the shipowner have an obligation under the warranty of seaworthiness or theories of negligence to anticipate a third party's single and wholly unforeseeable act of negligence and take extra precautions in order to guard against it?

2. Is a shipowner liable for an accident which is caused by an isolated, personal negligent act of a third party?

3. Did the trial court commit error when it excluded the shipowner's defense costs including reasonable counsel fees from the damages which were awarded by way of indemnity for breach of the warranty of workmanlike service?

Nature of Case

This case involves an accident to a longshoreman which occurred when a draft of 60-foot steel I beams swung across the square of the No. 1 hatch of the M/V JOBST OLDENDORF and came in contact with and dislodged a 26-foot steel I beam which was stowed in the hatch, causing it to topple over and pin the plaintiff's left leg. The I beam which was caused to topple over was part of cargo of steel I beams which the plaintiff and other longshoremen in the employ of International Terminal Operating Co., Inc. were to discharge at New York. No ship's equipment nor ship's personnel were involved in the discharging operation. Though the M/V JOBST OLDENDORF was equipped with booms and winches, a mobile crane located on the pier next to the vessel was engaged for the purpose of discharging the cargo of steel beams. It was owned by

Hoffman Crane and Rigging Service, Inc. (hereafter referred to as Hoffman), which together with a crane operator had been hired from Hoffman by plaintiff's employer, International Terminal Operating Co., Inc. (hereafter referred to as ITO), an independent stevedoring contractor.

Course of Proceedings and Disposition in Court below

The plaintiff initially sued the shipowner in the United States District Court for the Southern District of New York alleging that his injuries had been caused by the unseaworthiness of the M/V JOEST OLDENDORF and the negligence of her owner, Egon Oldendorf. The shipowner in turn impleaded the plaintiff's employer, ITO and Hoffman, the crane owner and employer of the crane operator, claiming indemnity against either or both for breach of warranty. Hoffman and ITO each cross-claimed against each other seeking both indemnity and/or contribution. After proceeding through various rather extensive discovery with all parties participating, the case against the shipowner only proceeded to trial before the Hon. Inzer B. Wyatt and a jury. The actions for indemnity by agreement were reserved for determination by the Court without a jury.

The case was submitted to the jury on special questions both on theories of negligence and unseaworthiness. The jury returned a verdict in which, in answer to the special questions, it found that the M/V JOBST OLDENDORF was not unseaworthy both as to stowage and the method employed in conducting the unloading operation, but that the shipowner was negligent. It awarded damages of $365,000.00 but found that the plaintiff's negligence contributed to his accident to the extent of 15%. As a result, the verdict was reduced to $310,250 (218a-221a).

Thereafter, the plaintiff was permitted to proceed in a direct action against Hoffman for negligence. In that action the plaintiff rested on the testimony which had been elicited on the trial of jury action against the shipowner (231a). Hoffman called three witnesses including the operator of the crane. On the completion of the testimony of these witnesses, the Court found that the plaintiff had established that the swinging of the draft of I beams and the resultant contact with the I beam which toppled over on plaintiff's left leg was caused by the negligence of the crane operator in elevating the head of the crane's boom without any signal from the signalman.

A judgment was entered awarding plaintiff recovery of $310,250 against Oldendorf and Hoffman, jointly and severally (312a). It further provided that if Oldendorf paid the judgment, it was to be indemnified by ITO and Hoffman, each for the sum of $155,125 together with interest on one-half of the costs taxed in favor of the plaintiff (312a). Though conceding that Oldendorf was also entitled to attorneys' fees and reasonable disbursements connected with the defense of the plaintiff's action, the Court conditioned their recovery on whether Oldendorf paid the judgment (307a). It, however, struck such provision from the judgment (312a).

The judgment also provided that if Hoffman paid the judgment, it recover of ITO the sum of $155,250 together with interest and one-half of the taxed plaintiff's costs.

The cross-claims and counterclaims otherwise asserted were dismissed (313a).

Statement of Facts

The facts in this case are not in dispute as to how and why the plaintiff's accident occurred. The sequence of events and relevant facts are well stated in the brief of

third party defendant ITO and therefore need not be repeated. Accordingly, only those additional facts or evidence will be set forth herein on which the plaintiff's case against the shipowner was submitted to the jury.

All of the cargo in the No. 1 hatch of the M/V JOBST OLDENDORF, with the exception of some steel plates at the bottom of the No. 1 hatch, consisted of steel I beams including the I beam which caused plaintiff's injury and were to be discharged at Port Newark, the vessel's first port of discharge (30a, 43a). Prior to the commencement of the discharging of the steel I beams, the ship's crew, in readying the hatch for the discharging operations, removed the chains which ran across the hatch over the top of the I beams and had been used to lash the cargo during the ocean voyage (21a, 432).

There was conflicting testimony as to whether the wooden chocks, dunnage and bracings which were put in between the steel beams to make a solid stow (20a) were removed prior to discharge or not. The plaintiff's witnesses testified that they had been removed by the ship's crew (660, 110a, 118a-119a, 135a). Photographs which had been taken by a cargo surveyor shortly before the accident showed that the chocks and dunnage had not been removed and that the I beam which was caused to topple over was braced by two wooden braces, one at each end (Ex. C-1, D1, 151a-154a).

There was no claim, however, that the removal of the lashings and the alleged removal of the chocks and braces rendered the stowage of the I beams in No. 1 hatch unsteady or created a condition which in any way interfered with normal discharging operations. It was conceded that the beams as stowed in the square of the hatch were even and level (66a, 110a, 118a-119a, 135). According to plaintiff's expert, "if they (the chocks, braces and lashings) had been left in place, even if the beam had struck it, I don't think it would have toppled over" (140a).

POINT I

It was error for the Court to submit the case against the shipowner to the jury.

Under the law, the evidence in this case presented no triable issue for jury determination insofar as the plaintiff's case against the shipowner was concerned either under negligence or unseaworthiness. The entire thrust of plaintiff's case against the shipowner was predicated on the concept that the shipowner had an obligation to provide him with a vessel which was not just safe and reasonably fit for the discharging of the cargo aboard her, but also one which was accident-proof as well. This concept has been rejected by the Supreme Court as well as various lower Courts. In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960), the United States Supreme Court in defining the shipowner's obligation under the warranty of seaworthiness, stated at page 550:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L.ed. 354, 75 S.Ct. 2."

In pointing out that even under the warranty of seaworthiness there was no obligation to provide an accident-free ship, and emphasizing that reasonable fitness did not require perfection or a vessel which would weather every conceivable storm or withstand every imaginable peril of the sea, the United States Supreme Court made it clear that even the absolute nature of the duty under the war-

ranty of seaworthiness did not impose an obligation on a shipowner to anticipate and guard against the single and wholly unforeseeable act of negligence of a third party.

In *Manhat* v. *United States,* 220 F.2d 143 (2 Cir. 1955) cert. denied, 349 U.S. 966 (1955), this Court rejected the very concept on which this case was submitted to the jury. In that case a workman sustained injury when the lever of the releasing gear of a lifeboat was released by a fellow workman, permitting the lifeboat to fall. In rejecting the contention that the vessel was unseaworthy and the shipowner negligent because of a failure to employ extra safety measures to prevent the lifeboat lever from being accidentally released, this Court in holding that the shipowner was not negligent, stated at page 147:

> "Under no theory could a standard be considered reasonable which imposed upon the shipowner a duty to safeguard absolutely against the possibility that the handle would be moved by one of these men."

In rejecting the contention that the failure to use extra precautions constituted unseaworthiness, this Court after noting the extent to which the scope of the warranty of seaworthiness had, in recent years, been extended, said at page 148:

> "* * * it has never been held to require the best possible equipment or to impose an insurer's liability for any and all injury to those working on shipboard, *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 2 Cir. 1954, 213 F.2d 397; see *Doucette* v. *Vincent,* 1 Cir., 1952, 194 F.2d 834. As this court held very recently, '[i]t requires only that equipment be reasonably fit for the use for which it was intended * * *.'"

It is thus apparent that under no theory, whether it be denominated negligence or unseaworthiness, is there a standard imposed by the law which requires that a ship-

owner has a duty not only to take precautions, but such precautions as will prevent the occurrence of an accident which is caused by the single isolated negligent act of any employee of an independent contractor.

POINT II

A shipowner is not liable for a third party's single and wholly unforeseeable act of negligence.

The trial court's finding that it was Hoffman's negligence which caused plaintiff's accident only serves to reemphasize the total lack of responsibility for plaintiff's accident on the part of the shipowner. In holding that the raising of the boom by Hoffman, without any signal to do so, "caused the sliding motion inshore of the draft which hit one of the I-beams, which in turn fell on plaintiff and caused the accident" (300a-302a), the court found precisely the type of conduct to which the United States Supreme Court made reference in *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971), when it said at page 500:

> "* * *. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence."

In this case as in *Usner,* no condition of unseaworthiness existed and the jury so found when in response to the questions as to whether the M/V JOBST OLDENDORF was unseaworthy as to (a) improper stowage and (b) improper unloading (189a), the jury responded in the negative (218a).

As this Court pointed out in *Bernardini* v. *Rederi A/B Saturnus,* 512 F.2d 660, 664 (2 Cir. 1975), where the only negligence with which a shipowner can be charged derives from a breach of duty with respect to a condition, but that condition does not exist, here is no duty as to that condition

and there can be no breach of such duty. In this instance, since under the Court's charge the plaintiff's theory of negligence was predicated on the very same conditions (improper stowage and improper loading) on which his unseaworthiness claim was based (177a), this case is governed by the decision in *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971) and the judgment awarding damages against the shipowner must be reversed and the complaint dismissed.

POINT III

The trial court was in error in denying recovery to the shipowner of its costs and expenses of defending against plaintiff's action including reasonable counsel fees.

Though the Court conceded that the shipowner was entitled to recover its defense costs including reasonable counsel fees as part of the indemnity, it conditioned recovery on whether the shipowner paid the judgment or not (307a), and then without further explanation, struck from the judgment the provision allowing the shipowner recovery of defense costs including reasonable counsel fees even if the shipowner paid the judgment (312a).

It is well settled that a shipowner's right to the costs and expenses of defending against the injured person's claim including reasonable counsel fees is not contingent on who pays the judgment or whose funds are used in satisfying the judgment in the first instance. In *DeGioia* v. *United States Lines Company*, 304 F.2d 421 (1962), this Court in holding that denial of attorneys' fees and expenses was error, stated at page 426:

> "Attorneys' fees and reasonable disbursements connected with the defense of the longshoreman's action are as foreseeable elements of the damage caused by

the stevedoring firm's breach of warranty as is the plaintiff's actual recovery, and the shipowner is entitled to a reasonable recovery of these sums. (Citing cases)"

In fact, attorneys' fees and reasonable disbursements connected with the defense of the injured worker's action are recoverable even when the shipowner has been successful in the defense of the main action and the injured worker recovers nothing. As this Court pointed out in *Guarracino* v. *Luckenbach Steamship Co.*, 333 F.2d 646, 648 (2 Cir. 1964) cert. denied, 379 U.S. 946 (1964), all that is required to entitle a shipowner to its defense costs and expenses is a potential liability and a breach by the service contractor of its warranty of workmanlike service giving rise to that potential liability.

Accordingly, the judgment below should be reversed and the shipowner Oldendorf awarded its expenses of defending the action against the plaintiff, including reasonable counsel fees, whether plaintiff's judgment against it is sustained or not.

Conclusion

The judgment against the shipowner Oldendorf in plaintiff's favor should be reversed and set aside and the complaint dismissed and a judgment entered in favor of the shipowner Oldendorf against Hoffman and ITO, or either of them, awarding to the shipowner its expenses of defending against the plaintiff's action including reasonable counsel fees.

In the alternative, should the judgment of the plaintiff against defendant Oldendorf be affirmed, the judgment awarding defendant Oldendorf indemnity in full against ITO and Hoffman with each paying one-half of said judgment, together with interest and costs, be affirmed with a

modification that ITO and Hoffman each pay to defendant Oldendorf one-half of its defense costs including reasonable counsel fees.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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INTERNATIONAL TERMINAL OPERATING CO. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Third-Party Defendants-Appellants and Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of July, 1976, he served two copies of Brief of Defendant and Third Party Plaintiff-Appellant, Egan Oldendorf on Hill, Betts & Nash, Esqs. for Appellee-appellant Hoffman Rigging, the attorneys for their office at One World Trade Center in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
26th day of July, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 26TH day of JULY, 1976
Robert ... [signature]
Attorneys for PLAINTIFF - APPELLEE

ATTORNEYS FOR APPELLEE - APPELLANT
HOFFMAN RIGGING

[signature]

ATTORNEYS FOR APPELLEE - APPELLANT
INTERNATIONAL TERMINAL OPERATING C